IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant

v.

VIRGIL B. STARNES,
Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS
OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT

M E M O R A N D U M O N J U R I S D I C T I O N *

Under Texas Law, venue rulings acquire the same finality as judgments on the merits. Wichita Falls and S.R. Co. v. MacDonald, 141 Tex. 555, 174 S.W.2d 951, 952 (1943); Williams v. Pitts, 151 Tex. 408, 251 S.W.2d 148, 149-150 (1952). The Texas court of last resort on this constitutional venue question has ruled against Appellants, and that ruling is, of course, the "law of the case" 4 Tex. Jur.2d, Rev., Part 2, Appeal & Error - Civil Cases §§997-1010 (1974).

Accordingly, if the Supreme Court of the United States does not now decide the constitutional venue question, then it

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*By leave granted in open court on February 23, 1976. The Memorandum is typewritten upon advice of the Clerk.

will not be decided at all within the context of this lawsuit if the Appellants lose in the trial court!* Obviously, it will not be the subject of any appellate review on this question if Appellants prevail in the trial court.

If Appellant had not taken a separate appeal from the trial court's adverse judgment on the constitutional venue question, then it would have been precluded from pursuing the venue question in its appeal on the merits, except possibly in the event the case was tried and appeal on the merits perfected within thirty (30) days of the Order over-ruling the plea of privilege. Inland Refining Co. v. Robinson, 256 S.W. 2d 843 (Tex. 1953).

This Court noted probable jurisdiction also in Exxon Corp. v. Jay M. Preston, 414 U.S. 1038 (1973), a case coming out of Texas on the same constitutional venue question as here presented.

This Court held that the "finality of judgment" doctrine did not preclude review of a Texas venue problem in Mercantile Nat'l Bank at Dallas v. C.H. Langdeau, 371 U.S. 555 (1963).

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*It would appear reasonable to reject as tortuously unrealistic returning this case to the trial court, and, should Appellant lose there on the merits, have us attempt either 1. to appeal directly from the trial court to this Court, or 2. to appeal from the Texas "court of last resort" (assuming Appellant loses at each level) -- in either case taking with the constitutional venue question all the unnecessary freight of non-federal questions. (In this latter case, obviously, to take the venue question again through the Texas appellate hierarchy would be vain and useless, because the Texas "court of last resort" has already ruled against us. That is why we are here)

We believe particularly applicable is the language in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) at page 546:

> "[T]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

In our case Appellant, absent this Court's review now, would lose the right to Equal Protection of the Laws so as to prevent Appellant from being venue-bound in Appellee's home county without Appellee having to prove a cause of action against Appellant, as he would were he suing a domestic corporation.

Finally, we believe that a reasonable analysis of the procedural posture of this case would place it "[i]n the third category [of] those situations where the federal claim has been finally decided [in the state court], with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." Cox Broadcasting Corp.v. Cohn, 420 U.S.469, 95 S.Ct. 1029, 1039 (1975).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joel W. Westbrook, hereby certify that the foregoing Memorandum on Jurisdiction was mailed by certified mail, return receipt requested, to Fred Horner, Dunnam, Dunnam & Dunnam, 4125 West Waco Drive, Waco, Texas 76710, attorneys for Appellee, on this 26th day of February, 1976. I further certify that all parties required to be served have been served.

Joel W. Westbrook